IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AFRIM DZELILI, individually and on behalf of all others similarly situated,

Plaintiff,

v.

WILDERNESS HOTEL & RESORT, INC. and VACATIONLAND VENDORS, INC.,

Defendants.

OPINION AND ORDER

11-cv-735-bbc

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Plaintiff Afrim Dzelili seeks to represent a class of more than 40,000 customers of defendants Wilderness Hotel & Resort, Inc. and Vacationland Vendors, Inc. He alleges that defendants suffered a security breach that resulted in the disclosure of the customers' personal financial information, including their credit card numbers. He is asserting claims under Wisconsin law for negligence, breach of contract and a violation of the deceptive trade practices statute, Wis. Stat. § 100.18, and he seeks damages for emotional distress, the cost of credit monitoring services and "the lost value of [his] personally identifiable information." He does not allege that anyone has attempted to make unauthorized charges on his credit card or that any of his financial information has been otherwise misused.

Both defendants have filed motions to dismiss on the ground that plaintiff has not suffered any compensable harm. In addition, Columbia Casualty Company has filed a motion to intervene in the case to obtain a declaration that it does not have a duty to defend or indemnify defendant Wilderness.

I am granting defendants' motion to dismiss under Pisciotta v. Old National Bancorp, 499 F.3d 629, 634 (7th Cir. 2007), in which the court concluded that the plaintiffs could not recover for a data breach without a showing that someone actually misused the information. Although the court decided Pisciotta under Indiana law, plaintiff fails to cite any Wisconsin authority that would justify a different result in this case.

I am denying Columbia's motion to intervene as untimely. Although defendant Wilderness filed a claim with Columbia in October 2011, Columbia did not file its motion to intervene in this court until March 15, 2012, more than a month after defendants' motions to dismiss had been fully briefed. Crowe ex rel. Crowe v. Zeigler Coal Co., 646 F.3d 435, 444 (7th Cir. 2011)(motion to intervene may be denied if it is untimely). I decline to keep this case open simply to allow Columbia to resolve a peripheral issue regarding the scope of its duties to defendant Wilderness.

OPINION

A. Subject Matter Jurisdiction

Before I can address the merits of defendants' motions, I must address two jurisdictional questions. Avila v. Pappas, 591 F.3d 552, 553 (7th Cir. 2010) ("The first question in every case is whether the court has jurisdiction."). The first is whether plaintiff has identified a statute that provides a basis for subject matter jurisdiction. In his complaint, he relies on a provision in the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), which applies to "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant."

This case has not yet been certified as a class, but it is enough that plaintiff has filed his complaint as a proposed class action. Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806 (7th Cir. 2010). With respect to the diversity requirement, plaintiff alleges that he and defendants are all citizens of Wisconsin, but that is not a problem so long as "at least one member of the proposed class is a citizen of a State different from" defendants. Pisciotta v. Old National Bancorp, 499 F.3d 629, 633 (7th Cir. 2007). Although plaintiff does not identify any particular class members who are citizens of other states, because the proposed class includes visitors to defendants' resorts in both Wisconsin and Tennessee, it is reasonable to infer at this stage that at least one is.

With respect to the amount in controversy, plaintiff alleges that the proposed class includes at least 40,000 members, which would require damages of no more than $125 for each class member to reach the $5,000,000 threshold. Plaintiff claims damages relating to emotional distress and the cost of credit monitoring services, so it is not unreasonable to infer that each class member could recover $125 if the class prevailed on their claims. Cf. Keeling v. Esurance Insurance Co., 660 F.3d 273, 275 (7th Cir. 2011) (jurisdictional minimum met even though it required drawing of inference that each plaintiff would receive punitive damages five times greater than her compensatory damages).

Defendants do not challenge plaintiff's view that more than $5,000,000 is in controversy for the purpose of determining jurisdiction, but they do contend that Wisconsin law would not award plaintiff *any* damages under any of his legal theories. This raises an issue the parties do not address. The court of appeals has stated on multiple occasions, including in cases brought under § 1332(d), that the amount in controversy requirement is not met if it is "legally impossible for [the plaintiffs] to recover that amount." Blomberg v. Service Corp. International, 639 F.3d 761, 763-64 (7th Cir. 2011). See also McMillian v. Sheraton Chicago Hotel & Towers, 567 F.3d 839, 844 (7th Cir. 2009) (courts "generally will accept the plaintiff's good faith allegation of the amount in controversy unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount.") (internal quotations omitted). This raises the question whether I must resolve the parties' dispute

over the availability of damages before I can exercise jurisdiction over the case.

In Pisciotta, 499 F.3d at 634, the court seemed to answer this question in the negative. As both sides recognize, Pisciotta involved claims similar to this case in which the plaintiffs wished to bring a class action under state law for a data breach. The court concluded with little discussion that jurisdiction was present under § 1332(d), even though the defendants argued that the plaintiff was not entitled to damages under state law and even though the court ultimately agreed with the defendants on that issue and affirmed the dismissal of the case. See also Booker-El v. Superintendent, Indiana State Prison, 668 F.3d 896, 899-900 (7th Cir. 2012) (courts should not confuse jurisdictional issues with merits of plaintiff's claim). In accordance with Pisciotta, I conclude that plaintiff's allegations are adequate to show that the jurisdictional minimum is met. Even if this is wrong, a court always has jurisdiction for the purpose of determining jurisdiction, Land v. Dollar, 330 U.S. 731, 739 (1947), so I would have to consider most of defendants' arguments regarding damages anyway.

Section 1332(d)(4) sets forth exceptions to an exercise of jurisdiction under § 1332(d)(2), which courts have called the "local controversy" and "home state" exceptions. Because defendants do not argue that either of these exceptions applies, I need not consider them. Hart v. FedEx Ground Package System Inc., 457 F.3d 675, 680 (7th Cir. 2006) ("[T]he party seeking to take advantage of the home-state or local exception to CAFA

jurisdiction has the burden of showing that it applies.").

Defendants challenge plaintiff's standing to sue, again on the ground that plaintiff has not suffered a compensable harm. That argument is foreclosed by Pisciotta, 499 F.3d at 634, in which the court held expressly that the increased risk of data misuse is sufficient to confer standing. Defendants' position seems to be that the court of appeals decided this issue incorrectly, but that is an argument defendants will have to raise with the court of appeals.

B. Failure to State a Claim

With respect to plaintiff's claims for negligence and breach of contract, defendants argue that plaintiff has failed to state a claim upon which relief may be granted because he has not identified any compensable harm. Plaintiff disagrees, relying on allegations in his complaint seeking damages for emotional distress, the cost of credit monitoring services and lost value of his personal financial information. Regardless whether I would agree with plaintiff as a matter of first impression that his allegations are sufficient to survive a motion to dismiss, I conclude that his claims for breach of contract and negligence are foreclosed by Pisciotta, 499 F.3d 629.

The claims at issue in Pisciotta were virtually indistinguishable from those in this case. The plaintiffs sought to represent a class of the defendants' customers; the class

members had given the defendants personal financial information; a security breach occurred in which a third party obtained access to that information; the plaintiffs requested "[c]ompensation for all economic and emotional damages suffered as a result of the Defendants' acts which were negligent, in breach of implied contract or in breach of contract," and "[a]ny and all other legal and/or equitable relief to which Plaintiffs . . . are entitled, including establishing an economic monitoring procedure to insure prompt notice to Plaintiffs . . . of any attempt to use their confidential personal information stolen from the Defendants;" and the plaintiffs did not allege that any of their personal information had been misused as a result of the breach. After reviewing the plaintiffs' allegations, the court concluded that "the damages that the plaintiffs seek are not compensable" under state law. Id. at 640.

Plaintiff argues that Pisciotta is not controlling, but his arguments are not persuasive. Potentially, the most important difference is that Pisciotta involved the application of Indiana law. If plaintiff could point to any relevant differences between Wisconsin and Indiana law on this issue, I would not hesitate to apply them, but plaintiff has cited *no* relevant Wisconsin authority in support of his view. This puts him in the same position as the plaintiffs in Pisciotta. After they failed to cite any Indiana authority suggesting that the state supreme court would allow an award of damages for a data breach without evidence of misuse, the court of appeals concluded that it would be inappropriate to create a damages

remedy: "We decline to adopt a substantive innovation in state law or to invent what would be a truly novel tort claim on behalf of the state absent some authority to suggest that the approval of the Supreme Court of Indiana is forthcoming." Id. at 640. Federal courts applying Illinois law have followed Pisciotta under this reasoning. Worix v. MedAssets, Inc., No. 11 C 8088, 2012 WL 787210, *6 (N.D. Ill. Mar. 8, 2012). Because plaintiff has failed to cite a single Wisconsin case to support his negligence and breach of contract claims, I must reach the same conclusion.

Plaintiff asks the court to disregard Pisciotta because the law on damages in data breach cases "has continued to develop" since the court of appeals decided that case. Plt.'s Br., dkt. #21, at 11. In support of this view, plaintiff cites Anderson v. Hannaford Brothers Co., 659 F.3d 151 (1st Cir. 2011), and Claridge v. RockYou, Inc., 785 F. Supp. 2d 855 (N.D. Cal. 2011).

These cases carry little weight for two reasons. First, neither of them stands for the proposition that a plaintiff is entitled to recover damages for a data breach under a breach of contract or negligence theory when the data has not been misused. In Anderson, 659 F.3d at 164, thieves used the plaintiffs' data "to run up thousands of improper charges across the globe to the customers' accounts. The card owners were not merely exposed to a hypothetical risk, but to a real risk of misuse." The court relied on this fact in distinguishing other cases in which the court dismissed claims involving a data breach. Id. Further, in a recent case,

the same court declined to allow similar claims to proceed when the plaintiff did not allege that any misuse had occurred. Katz v. Pershing, LLC, No. 11-1983, — F.3d —, 2012 WL 612793, *12 (1st Cir. Feb. 28, 2012).

Claridge is more on point because the court allowed the plaintiffs to proceed past the pleading stage even though they did not allege that their data had been misused. However, even in Claridge, the court's conclusion was tentative to say the least. The court acknowledged that the plaintiffs were "advancing a novel theory of damages for which supporting case law is scarce" and it expressed "doubts about plaintiff's ultimate ability to prove his damages theory." Claridge, 785 F. Supp. 2d at 862. Further, the court did not analyze the merits question separately from the issue of standing. Instead, once the court concluded that the plaintiff had alleged sufficient facts to show standing, it assumed that the same facts were sufficient to show damages as well. Id. at 865-66. That is inconsistent with the court's approach in Pisciotta.

In any event, neither Claridge nor Anderson is binding and neither court was applying Wisconsin law. Plaintiff is correct that, in Pisciotta, 499 F.3d at 635, the court of appeals stated that it is appropriate to "examine the reasoning of courts in other jurisdictions addressing the same issue and applying their own law for whatever guidance about the probable direction of state law they may provide." However, the court also cited several other cases for the proposition that federal courts should be reluctant to expand liability on

a matter of state law in the absence of guidance from the courts of that state. Insolia v. Philip Morris Inc., 216 F.3d 596, 607 (7th Cir. 2000) ("Federal courts are loathe to fiddle around with state law. Though district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims."); Home Valu, Inc. v. Pep Boys, 213 F.3d 960, 965 (7th Cir. 2000) (adopting interpretation of state law which, between two possible options, "take[s] the approach that is restrictive of liability"); Todd v. Societe Bic, S.A., 21 F.3d 1402, 1412 (7th Cir. 1994) ("When given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path (at least until the [state] Supreme Court tells us differently).").

Particularly because it seems that the vast majority of courts have declined to recognize plaintiff's theory of damages, I cannot say that the Wisconsin Supreme Court likely would adopt plaintiff's view. In addition to the many cases cited by the court in Pisciotta, 499 F.3d at 639, several other courts since then have reached the same conclusion. E.g., Paul v. Providence Health System-Oregon, 351 Or. 587, — P. 3d — , 2012 WL 604183, * 6 (Or. Feb. 24, 2012); Reilly v. Ceridian Corp., 664 F.3d 38, 43-46 (3d Cir. 2011); Krottner v. Starbucks Corp., 406 Fed. Appx. 129, 131, 2010 WL 5185487, *1 (9th Cir. 2010); In re Facebook Privacy Litigation, 2011 WL 6176208, *5 (N.D. Cal. 2011);

Amburgy v. Express Scripts, Inc., 671 F. Supp. 2d 1046, 1054–55 (E.D. Mo. 2009); Belle Chasse Automobile Care, Inc. v. Advanced Auto Parts, Inc., No. 08 C 1568, 2009 WL 799760, at *3 (E.D. La. Mar. 24, 2009); Caudle v. Towers, Perrin, Forster & Crosby, Inc., 580 F. Supp. 2d 273, 281–82 (S.D.N.Y. 2008).

Next, plaintiff says that he has alleged additional damages that the plaintiffs in Pisciotta did not, namely, "the lost value of [his] personally identifiable information." Plt.'s Br., dkt. #21, at 11. Although it may be true that the plaintiffs in Pisciotta did not include in their complaint an express request for that type of damages, it is clear that they raised a similar argument on appeal and the court rejected it. Pisciotta, 499 F.3d at 637 (rejecting arguments "that an individual has suffered a compensable injury at the moment his personal information is exposed because of a security breach" and that plaintiffs "suffered an immediate injury when their information was accessed by unauthorized third parties"). Thus, plaintiff cannot avoid the holding in Pisciotta through artful pleading.

Finally, throughout his brief, plaintiff emphasizes the seriousness of the problem of identity theft, but that type of public policy argument is not one I can consider. If plaintiff believes that data breaches should be remedied even in the absence of any misuse of the information, he should direct his arguments to the Wisconsin legislature.

With respect to plaintiff's claim under Wis. Stat. § 100.18, defendants say that plaintiff has failed to allege a "pecuniary loss" as required by the statute. In response,

plaintiff does not cite any authority in support of a view that "pecuniary loss" under § 100.18 encompasses a greater range of damages than those available for a breach of contract or negligence claim. Rather, plaintiff simply refers back to the same argument he made for his other claims, so I see no reason to reach a different conclusion for the statutory claim. In any event, a claim under § 100.18 requires a "representation" that was "untrue, deceptive or misleading," Novell v. Migliaccio, 2008 WI 44, ¶ 49, 309 Wis. 2d 132, 749 N.W.2d 544, but plaintiff fails to point to any misrepresentations defendants made.

In his brief, plaintiff says, "when Defendants accepted credit cards and debit cards as a form of payment, they were implicitly representing to Plaintiffs that they had the ability to keep Plaintiffs' financial information secure." Plt.'s Br., dkt. #21, at 18. In other words, plaintiff's theory is that defendants were "representing" that nothing would happen to his information simply by accepting that information from plaintiff. However, if that were enough to establish a misrepresentation, every claim for breach of contract and negligence could be repackaged as a misrepresentation claim. Not surprisingly, plaintiff cites no authority in which a court adopted his view or anything remotely similar.

Plaintiff cites Novell v. Migliaccio, 2010 WI App 67, ¶ 11, 325 Wis. 2d 230, 236, 783 N.W.2d 897, 900, in which the court concluded that representations are not limited to statements, but may also include acts. In particular, the court held that painting a basement wall to hide a leak could be a misrepresentation to purchasers of a home. Novell is not

instructive because, in this case, plaintiff does not allege that defendants deliberately concealed any information from him. Even if accepting a credit card could be a representation of some kind under § 100.18, it could not be construed reasonably as a representation that a third party will be unable to obtain that data.

ORDER

IT IS ORDERED that

1. The motions to dismiss filed by defendant Vacationland Vendors, Inc., dkt. #9, and defendant Wilderness Hotel & Resort, Inc., dkt. #12, are GRANTED for plaintiff Afrim Dzelili's failure to state a claim upon which relief may be granted.

2. Columbia Casualty Company's motion to intervene, dkt. #25, is DENIED.

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 27th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge